

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

95356
20533

FILE: B-181929

DATE: February 12, 1975

MATTER OF: E. R. Queen Company

DIGEST:

1. Rejection of bid as nonresponsive to "open ended" delivery provision, which included no criteria upon which to evaluate bidder's stated time of shipment in excess of "desired time" and which can only result in uneven and unpredictable treatment of bidders, would normally require cancellation of award and readvertising. However, such action is not required where award was made on urgency basis and performance is in advanced stage. Agency advised, however, that such provision should not be included in future solicitations.
2. Award of contract on basis of urgency prior to resolution of protest was proper where expiration of only bid considered responsive would necessitate readvertisement delay of 60 to 90 days and such delay would threaten inundation of airport and would be basis of claim by Government construction contractor to whom items being procured were to be furnished as Government property.

On May 2, 1974, invitation for bids (IFB) No. K-38, 037-0, was issued by the Department of Interior, Bureau of Reclamation, Engineering and Research Center, Denver, Colorado (Interior). The IFB, with an amendment of June 7, 1974, solicited bids for turbine type pumping units for Esquatzel Coulee Pumping Plant. Three bids were received and opened on the scheduled opening date, June 28, 1974. Both the low bid of Peerless Pacific Company and the second low bid of E. R. Queen Company (Queen) were rejected as nonresponsive to the IFB's delivery provision. Queen, in a timely manner, has protested to this Office the Bureau's rejection of its bid.

Concerning the delivery provisions, as pertinent here, Section (d) of the solicitation read in part:

"Complete shipment of the turbine-type pumping units under the schedule will be made from a United States shipping point or points within _____ calendar days after date of receipt of notice of award of contract. In accordance

with the requirements of Paragraph A-2, shipment is desired within 365 calendar days and this desired time shall establish the contract shipment date unless the offeror states a longer time."

Section (j), Paragraph A-2, provided further as follows:

"a. Time of shipment.-Time of shipment is important and complete shipment of the turbine-type pumping units from the shipping point or points is desired within 365 calendar days after date of receipt by the contractor of notice of award of contract. * * *

"Offerors are required to state, in the blank or blanks provided therefor in the solicitation, a definite period of time within which shipment will be made. If the offeror fails to insert the number of calendar days in which complete shipment will be made, the offer will be considered upon the basis that complete shipment will be made within the desired period of time and the offeror agrees to accept award on that basis. All offers specifying complete shipment within the desired number of calendar days will be considered on an equal basis with regard to time of shipment. The stated time, if in excess of the desired time, will be considered in making award of contract." (Emphasis added.)

In lieu of entering a number of days for shipment in the provided blank, Queen's bid included the following notation:

"* * * It has been determined that the pumping units can be shipped in the required 365 days or less, however under current market and materials availability conditions, this may vary slightly either way. The motors specified are currently scheduled at 66 to 70 weeks for shipment, however we would expedite all possible."

Based on the above notation, the contracting officer determined that Queen's bid was impossible to evaluate since there was not a definite period of time in which complete shipment would be made. In its report to this Office, Interior has pointed out the following as illustrative of the ambiguities in Queen's notation:

- "1. The fact that the pumping units 'can be shipped in the required 365 days or less' (emphasis added) is not a definite statement of what the shipping period would be. The bidder provided further ambiguity by adding 'however under current market conditions, this may vary slightly either way,' an indication that the bidder was reluctant to commit itself to a definite shipping period.
- "2. The statement that 'the motors specified are currently scheduled at 66 to 70 weeks for shipment' (emphasis added) is not a definite statement of what the shipping period would be. Again, the bidder provided further ambiguity by adding 'however, we would expedite all possible.'
- "3. The range of weeks, 66 to 70, in itself is not a definite statement of shipping period.
- "4. The notation is ambiguous since it is not clear if the pumps would be shipped in 365 days or less and the motors in 66 to 70 weeks, or whether the shipment of pumps and motors would be delayed beyond 66 to 70 weeks so that they could be tested with the motors in accordance with Subparagraph B-6. (1)(a) of the solicitation."

It is Queen's position that its response stated a definite period of time within which complete shipment would be made. Queen points out that under the terms of the IFB the pumping units and motors may be shipped separately, which it proposed because each is manufactured by a different manufacturing concern. It is Queen's argument, therefore, that while it stated an approximate delivery of 365 days for the pumps, and 66 to 70 weeks for the motors, complete shipment was in effect promised not to exceed 70 weeks.

However, we do not find it necessary to decide whether Queen's bid stated a definite period of delivery for the following reason. In 51 Comp. Gen. 518, 521 (1972), we observed:

"We think this open-ended delivery provision is objectionable because it does not provide a definite standard against which all

bidders can be measured or on which all bids can be based. Put another way, this clause allows bidders to determine the delivery date without any specified limitation whatsoever, and we think it is reasonable to assume that a variation in offered delivery dates can be directly responsible for variations in bid prices, thus giving a bidder who offers a later delivery date a possible price advantage. Should there be a wide variation in offered delivery dates, the contracting officer would not be able to consider delivery time in making award since it was not specified as an evaluation factor, and he would have to make award to the low responsive bidder or cancel the solicitation. 49 Comp. Gen. 713 (1970)."

While normally a contract awarded pursuant to a solicitation containing a defective provision should be canceled and the procurement resolicited, we do not believe this should be required in the instant case. We note that the contract was awarded in August 1974, notwithstanding the pendency of the protest, pursuant to a finding of urgency. The Determination and Findings (D&F) justifying such action includes information to the effect that expiration of the only bid considered responsive would necessitate readvertisement and a 60 to 90 day delay in award, and that such delay would threaten inundation of the City of Pasco Airport and would be the basis for an expensive claim by the construction contractor to whom the Government was furnishing the pumps. In these circumstances, and since award was made in good faith, we do not believe it would be in the Government's interest to cancel the contract. However, we are advising the agency that such provision should not be used in future procurements.

Finally, Queen has questioned the agency's award of the contract on the basis of urgency after Queen was requested to extend its bid acceptance period 45 days.

Interior reports that the three bidders were requested to grant a 45-day bid extension in order that the protest could be resolved prior to award. Although Queen readily agreed to such extension, the only bidder considered responsive would not agree to an unconditional extension. It was determined, therefore, pursuant to FPR 1-2.407-8(b)(4) (1964 ed.), that an immediate award to the only responsive bidder was in the Government's interest, otherwise readvertisement would result in a 60 to 90 day delay in award. We believe the record reasonably supports this determination.

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Accordingly, there is no basis for further action by our Office.

By the Hon.
Acting Comptroller General
of the United States